Supreme Court, U.S.
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No. 97-875

In The

Supreme Court of the United States

October Term, 1997

DALE KAYMARK,

Petitioner,

vs.

WAYNE E. BOLEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ANDREW J. CONNER
Counsel of Record
CONNER & RILEY
Attorneys for Respondent
17 West Tenth Street
Erie, Pennsylvania 16501
(814) 453-3343

72755 (800) 3 APPEAL • (300) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

TABLE OF CONTENTS

Page

Table of Citations ii

Counterstatement of Facts 1

Reasons for Denial of Writ 5

I. Whether The Court Below's Holding That Rule 4(m) Of F.R.C.P., As Amended, Allows A District Court Discretion To Extend The Time For Completion Of Service Of Process Beyond The 120 Days From The Date When The Action Was First Filed, Even Though "Good Cause" May Not First Have Been Established, Is In Accord With Rule 4(m), As Amended; The Advisory Committee Notes To This Rule; And The Holdings Of Other Circuits Specifically Addressing This Issue. ... 5

II. Whether The Court Below's Holding, By Implication, That This Action Was Timely Filed In The District Court To Satisfy The Controlling Statute Of Limitations And Whether The Tolling Of The Controlling Statute Of Limitations Was Not Dependent Upon Completion Of Formal Service Of Process When Kaymark Had Multiple Actual Notices Of The Claim Of Boley Is In Accord With The Controlling Law. 11

III. When Reviewing A Discretionary Decision By A District Court And Concluding That The District Court Based Its Discretionary Decision On An Error Of Law And When The District Court Did Not Make Any Other Finding To Support Its

Contents

Page

Decision, Whether The Court Below Committed Error In Remanding The Matter Back To The District Court To Make Further Findings. 16

IV. Whether The Court Below, Considering That Whatever Statute Of Limitations Defense Kaymark May Have To The Claim Of Boley Has Not Been Impaired And May Be Raised As A Defense To Boley's Claim Per Rule 8(c) Of F.R.C.P., Violated The Rules Enabling Act, 28 U.S.C. § 2072, By Holding That Kaymark Would Suffer "No Prejudice" If Boley's F.R.C.P. Rule 4(m) Motion Was Granted. 20

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Adams v. Alliedsignal General Aviation Avionics, 74 F.3d 882 (8th Cir. 1996) 6, 8

Binicewicz v. General Electric Co., 1995 WL 628425 (N.D. Ill. 1995) 6

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 17, 18, 19

Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980) 18, 19

Contents

	Page
Del Raine v. Carlson, 1996 U.S. App. Lexis 2645 (7th Cir. 1995)	6, 15
Espinoza v. United States, 52 F.3d 838 (10th Cir. 1995)	6, 8
Fulco v. Shaffer, __ Pa. Super. __, 686 A.2d 1330 (1996)	13
Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91 (4th Cir. 1976)	21
Henderson v. United States, 116 S. Ct. 1638, 134 L. 3d 880, __ U.S. __ (1996)	9, 10, 15
Icicle Seafood, Inc. v. Worthington, 475 U.S. 709 (1986)	16, 17, 19
Koon v. United States, __ U.S. __, 135 L. Ed. 2d 392 (1996)	18, 19
Kozak v. City of Philadelphia, 313 Pa. Super. 89, 459 A.2d 424 (1983)	21
Leidich v. Franklin, 394 Pa. 302, 575 A.2d 914 (1990)	13
Lieb v. Topstone Industries, Inc., 788 F.2d 151 (3rd Cir. 1986)	20
MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086 (3rd Cir. 1995)	5

Contents

Page

Mendez v. Elliot, 45 F.3d 75 (4th Cir. 1995) 5, 8, 9

Myers v. Secretary of the Department of Treasury, 173 F.R.D. 44 (E.D.N.Y. 1997) 6

Panaras v. Liquid Carbonic Industries Corp., 94 F.3d 338 (7th Cir. 1996) 14

Patterson v. American Bosch Corp., 914 F.3d 384 (3rd Cir. 1990) 12, 13

Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298 (3rd Cir. 1995) 5, 8

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 17, 19

Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976) 21

Thompson v. Brown, 91 F.3d 20 (5th Cir. 1996) 6

United States v. Monaco, 23 F.3d 793 (3rd Cir. 1994) . 19

Weber v. Wyoming Valley West School District, __ Pa. Cmwlth. __, 668 A.2d 1218 (1995) 21

Young v. PennDot, __ Pa. Cmwlth. __, 690 A.2d 1300 (1997) 13

Contents

Page

Statutes Cited:

28 U.S.C. § 1332 1

28 U.S.C. § 2072 ..... 20, 22

47 U.S.C.A. § 741, *et seq.* 9

42 Pa. C.S.A. 5524(2) 11, 13

Rules Cited:

F.R.C.P. 4 ..... 2, 3, 7, 14

F.R.C.P. 4(d) 1, 3

F.R.C.P. 4(d)(2) 17

F.R.C.P. 4(j) 7, 8

F.R.C.P. 4(m) .....
.....2, 5, 6, 7, 8, 9, 10, 12, 14, 16, 17, 18, 19, 20, 22

F.R.C.P. 8(c) 20, 21

F.R.C.P. 12(b) 2, 3, 21, 22

COUNTERSTATEMENT OF FACTS

Respondent, Wayne E. Boley, hereinafter referred to as "Boley", a resident and citizen of the State of Ohio, on July 6, 1993 in Beaver County, Pennsylvania incurred personal injuries in a two vehicle motor vehicle collision caused by Petitioner, Dale Kaymark, hereinafter referred to as "Kaymark", a resident and citizen of the Commonwealth of Pennsylvania. Boley claims that Kaymark was negligent in causing this collision because Kaymark failed to yield the right-of-way to Boley as required by law.

On July 3, 1995, Boley timely filed a Complaint against Kaymark in the United States District Court for the Western District of Pennsylvania. Jurisdiction for this action in the United States District Court for the Western District of Pennsylvania was based upon 28 U.S.C. § 1332. On July 5, 1995, Boley complied, in part, with Rule 4(d) of the Federal Rules of Civil Procedure by sending Appellee a letter, Summons and Complaint by way of Certified Mail, to Kaymark's home address in Pennsylvania.[1]

The Complaint forwarded to Kaymark on July 5, 1995 clearly notified Kaymark that legal action had been commenced against him by Boley for this collision. Kaymark did not respond. The District Court found that the documents forwarded to Kaymark on July 5, 1995 failed to conform with all of the requirements of F.R.C.P. 4(d). The transmittal letter did not

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1. Boley forwarded to Kaymark on July 5, 1995 by Certified Mail, Return Receipt Requested: (1) the Complaint; (2) Summons; (3) Request for Production of Documents; (4) Interrogatories; and (5) a letter advising that he was required to answer the Complaint with twenty (20) days. The document which was lacking was the "Notice of Lawsuit and Request for Waiver of Service for Summons". That document was forwarded to Kaymark on February 28, 1996.

expressly notify Kaymark of the commencement of an action, even though the Complaint did, and/or request that he waive personal service and/or provide a "waiver of service" form which Kaymark could return for filing.

On December 6, 1995, counsel for Kaymark entered a general appearance. On February 22, 1996, Kaymark filed an F.R.C.P. 12(b) Motion to Dismiss. Kaymark's 12(b) Motion was based on Boley's failure to perfect service of process as required by Rule 4 of F.R.C.P. On February 28, 1996, Boley filed a Memorandum contrary to Kaymark's Motion to Dismiss.[2] Boley also requested an extension of time to effect service, pursuant to Rule 4(m) of F.R.C.P.

On February 28, 1996, Boley served upon Kaymark a copy of the same documents plus the form and self addressed envelope.[3] On May 7, 1996, Boley filed a supplemental Memorandum contrary to Kaymark's Motion to Dismiss and an Affidavit of Service confirming that Kaymark was served with a Complaint and Summons by Certified Mail on February 28, 1996 and March 21, 1996.

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2. The District Court specifically treated a pleading styled as a "Memorandum Contrary to Defendant's Motion to Dismiss" as a Motion per F.R.C.P. 4(m) to extend the time in which to complete the service of process required by F.R.C.P. 4(m). The District Court acknowledged ". . . Boley did move for an extension of time to effect service. His motion was filed on March 4, 1996 . . ." (Pet. at A13).

3. On February 28, 1996, Boley served, by Certified Mail, the following documents on Kaymark:

1) Complaint;
2) Summons;
3) Notice of Lawsuit and Request for Waiver of Service for Summons;
4) Request for Production of Documents;
5) Interrogatories; and
6) Self-addressed stamped envelope.

On March 21, 1996, a copy of the same documents served by Certified Mail on February 28, 1996 were served a second time on Kaymark by Certified Mail.[4] Kaymark did not respond to the letter of February 28, 1996 nor the letter of March 27, 1996. Kaymark did not sign and return the waiver of service of Summons forwarded to him on February 28, 1996 and March 27, 1996.

Kaymark claimed in the February 22, 1996 Rule 12(b) Motion that, among other things, Boley had failed to fully comply with the service of process requirements set forth in F.R.C.P. 4(d). Boley was not given the opportunity in the District Court to make a record to establish the facts and circumstances surrounding the delay in perfecting the service process requirements between July 3, 1995 and February 22, 1996.

On August 29, 1996, the District Court, in a Memorandum Opinion and Order, granted Kaymark's Motion to Dismiss. The District Court held that Boley failed to comply with Rule 4 of F.R.C.P. and the underlying Pennsylvania law and timely complete the service of process requirements which Appellant had started on July 5, 1995.

The District Court, in refusing to grant Boley's request to extend the time beyond the 120 days to complete service of process, concluded that granting Boley's Motion would cause

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4. On March 21, 1996 Appellant served, by Certified Mail, the following documents on Appellee:

1) Complaint;
2) Summons;
3) Notice of Lawsuit and Request for Waiver of Service for Summons;
4) Request for Production of Documents;
5) Interrogatories; and
6) Self-addressed stamped envelope.

Kaymark "severe prejudice" in the context of a statute of limitations defense. No other reason was given by the District in denying Boley's request. Under the controlling law, Kaymark did not have a valid statute of limitations defense and considering that this was the sole reason given by the District Court for denying Boley's request to extend the time to complete service of process, there was no evidence before the District Court that Kaymark would suffer any prejudice if Boley's Motion was granted.

The court below was correct in concluding that the District Court committed an abuse of discretion in denying Boley's request, as it was based on an error of law.[5] Under these circumstances, the appropriate remedy was for the court below to remand this matter to the District Court for further consideration of Boley's request to extend the time of service beyond 120 days.

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5. *See* the authorities cited on page 16-17 of this response.

REASONS FOR DENIAL OF WRIT

I.

WHETHER THE COURT BELOW'S HOLDING THAT RULE 4(m) OF F.R.C.P., AS AMENDED, ALLOWS A DISTRICT COURT DISCRETION TO EXTEND THE TIME FOR COMPLETION OF SERVICE OF PROCESS BEYOND THE 120 DAYS FROM THE DATE WHEN THE ACTION WAS FIRST FILED, EVEN THOUGH "GOOD CAUSE" MAY NOT FIRST HAVE BEEN ESTABLISHED, IS IN ACCORD WITH RULE 4(m), AS AMENDED; THE ADVISORY COMMITTEE NOTES TO THIS RULE; AND THE HOLDINGS OF OTHER CIRCUITS SPECIFICALLY ADDRESSING THIS ISSUE.

In *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1305 (3rd Cir. 1995), the Third Circuit held that F.R.C.P. 4(m) as amended allowed a District Court, in its discretion, to extend the time to complete service of process without first requiring that "good cause" be established for such an extension. *See also MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1098 (3rd Cir. 1995). The court below followed its holding in *Petrucelli*, *supra* when reversing and remanding this matter to the District Court.

Kaymark now claims, for the first time in its Petition for Certiorari, that neither the Third Circuit nor the District Court should have followed the holding in *Petrucelli*, *supra*, set forth above. Kaymark claims that the Fourth Circuit's holding in *Mendez v. Elliot*, 45 F.3d 75, 78 (4th Cir. 1995), to the effect that a District Court does not have this discretion to extend the time in which service can be established beyond 120 days unless "good cause" is first established is the correct interpretation of Rule 4(m), as amended.[6]

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6. Neither in the District Court nor in the court below did Kaymark (Cont'd)

The court below's holding that a District Court has the discretion to extend the time of service beyond the 120 day period of time, set forth in the Rule, even though good cause for such an extension was not first established, is consistent and in accord with the language of F.R.C.P. 4(m), as amended, the committee notes to F.R.C.P. 4(m), as amended, and the holding of those other circuit courts which have addressed this specific issue. *See Adams v. Alliedsignal General Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1996) ("If plaintiff fails to show good cause, the court may still extend the time for service rather than dismiss the case without prejudice"); *Espinoza v. United States*, 52 F.3d 838, 841 (10th Cir. 1995) (". . . failure to show good cause for the mandatory extension of time does not end the inquiry . . . The district court must still consider whether a permissive extension of time may be warranted"); *Thompson v. Brown*, 91 F.3d 20 (5th Cir. 1996) (". . . 4(m) broadens a district court's discretion by allowing it to extend the time for service, even when a plaintiff fails to show good cause"); *Del Raine v. Carlson*, 1996 U.S. App. Lexis 2645 (7th Cir. 1995) (The Seventh Circuit concludes that Rule 4(m), as amended, represents a "significant change" and allows a district court discretion to extend the time for service, even if good cause is not shown).[7]

(Cont'd)
raise the issue that the District Court lacked discretion to extend the time for service under these circumstances. Kaymark assumed this was the controlling law. Therefore, the issue that was presented to the court below was whether or not there was an "abuse of discretion" in not granting such an extension to Boley, even though good cause was not first established.

7. District Courts in some circuits, other than the Third, Fifth, Seventh, Eighth and Tenth Circuits, have concluded that new F.R.C.P. 4(m) allows a District Court to extend the time of service beyond 120 days, absent a showing of good cause. *See Myers v. Secretary of the Department of Treasury*, 173 F.R.D. 44, 47 (E.D.N.Y. 1997); *Binicewicz v. General Electric Co.*, 1995 WL 628425 (N.D. Ill. 1995).

Before the 1993 amendments to the Federal Rules of Civil Procedure, this issue was controlled by F.R.C.P. 4(j). That Rule provided, in part:

> (j) Summons: Time limit for service. If a service of the summons and complaint is *not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice . . .*

(Emphasis supplied).

In 1993, Rule 4 was amended. What was formerly covered by F.R.C.P. 4(j), above, was now covered by F.R.C.P. 4(m). F.R.C.P. 4(m), as amended provides:

> (m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion *or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period . . .*

(Emphasis supplied).

The mandatory dismissal language after 120 days between the time the action was commenced and the lack of completion of service of process contained in F.R.C.P. 4(j) was deleted by

the 1993 amendments. The advisory committee notes recognized the significance of this change when they reported:

> The *new subdivision* explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, *and authorizes the court to relieve a plaintiff of the consequence of an application of this subdivision even if there is no good cause shown.*

(Emphasis supplied).

In its Petition for Certiorari, Kaymark claims, despite the change in the language between old F.R.C.P. 4(j) and new F.R.C.P. 4(m), the Advisory Committee Notes, made reference to above, and the holding by the Third Circuit in *Petrucelli, supra*; *Adams, supra*; and *Espinoza, supra*, that the rules require a mandatory dismissal of the action after 120 days if service has not been completed and good cause has not been first established for the delay in completion of the service of process. Relying upon the holding by the Fourth Circuit in *Mendez, supra*, 45 F.3d at 78-79, Kaymark claims to the effect that a district court, under F.R.C.P. 4(m), as amended, did not have any discretion to extend the time of service without a showing of "good cause" if more than 120 days had expired from the time the action was initiated. *Mendez, supra* is distinguishable from the instant case on its facts. In *Mendez, supra*, there was no contention made by Mendez in the District Court that the District Court had discretion to extend the time for service when service had not been accomplished within 120 days. *See Mendez, supra*, 45 F.3d at p. 79 (". . . Mendez never requested an extension of time . . ."). Therefore, the District Court was not faced with a request to extend the time of service, even though good cause had not been first established based on the language change

created to Rule 4(m) by the 1993 amendments. Because that specific issue was not raised in the District Court, it was not addressed by the Fourth Circuit. Secondly, the Fourth Circuit made a factual finding that Mendez never requested an extension of time to complete this service of process. *Mendez, supra*, 45 F.3d at 79. Here, the District Court acknowledged that Boley in fact, had requested an extension of time to complete service.[8]

The precise issue presented here was not presented to the Court in *Henderson v. United States*, 116 S. Ct. 1638, 134 L. 3d 880, __ U.S. __ (1996) because the action was an admiralty or maritime action per 47 U.S.C.A. § 741, *et seq.* started in 1991, prior to the 1993 amendments. However, this Court addressed the 1993 amendments to F.R.C.P. 4(m) stating:

> Most recently, in 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period, "even if there is no good cause shown." See Advisory Committee's Notes on Fed. Rule Civ. Proc. 4, 28 U.S.C. App., p. 654.

116 S. Ct. at 1643.

> The Federal Rules thus convey a clear message: Complaints are not to be dismissed if served within 120 days, or within such additional time as the court may allow.

116 S. Ct. at 1644.

The Advisory Committee Notes to F.R.C.P. 4(m), as amended, state that the 1993 amendments intended to give a District Court discretion to extend the time to complete service of process after a lapse of 120 days, even though good causae is

8. *See* page 2, n.2.

not first shown. One of the examples that the Committee cited as to when the Court should act is the precise situation presented here, *i.e.*, a dismissal without prejudice but after the statute of limitations had run so any subsequent action would be barred by the statute of limitations.

The Third, Fifth, Seventh, Eighth and Tenth Circuits have followed the Advisory Committee's suggested interpretation of Rule 4(m), as amended. This Court in *Henderson, supra*, 116 S. Ct. at 1643-44, acknowledges this to be the correct interpretation of Rule 4(m), as amended.

The court below here correctly concluded that the District Court had this discretion, even though good cause was not first shown. It correctly found that the District Court abused its discretion in denying Boley's March 4, 1996 request to extend the time to complete formal service of process. The court below correctly concluded that in deciding whether Boley's Motion should be granted, proof of "actual prejudice" to Kaymark was a relevant factor to be considered by the District Court. Here, the court below correctly determined that there was no evidence that Kaymark would suffer any actual prejudice if Boley's Motion was granted.

II.

WHETHER THE COURT BELOW'S HOLDING, BY IMPLICATION, THAT THIS ACTION WAS TIMELY FILED IN THE DISTRICT COURT TO SATISFY THE CONTROLLING STATUTE OF LIMITATIONS AND WHETHER THE TOLLING OF THE CONTROLLING STATUTE OF LIMITATIONS WAS NOT DEPENDENT UPON COMPLETION OF FORMAL SERVICE OF PROCESS WHEN KAYMARK HAD MULTIPLE ACTUAL NOTICES OF THE CLAIM OF BOLEY IS IN ACCORD WITH THE CONTROLLING LAW.

In refusing to grant Boley's request to extend the time in which Boley had to complete the service of process on Kaymark, the District Court concluded that the policy supporting the controlling two year statute of limitations for personal injury actions in Pennsylvania, *i.e.*, 42 Pa. C.S.A. 5524(2), would be violated if Boley's motion was granted and if Boley completed the service on Kaymark, as requested.[9] No other reason, other than statute of limitations reasons, was given by the District Court in denying Boley's Motion.

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9. The District Court concluded, in denying Boley's motion to extend the time for service, stating:

> Contrary to Boley's assertions, an extension of time for service now would work *extreme prejudice against Kaymark*. The purpose of the statute of limitations period is to protect the defendant from having to defend against stale claims and to ensure and restore stability and security of the peoples' affairs. *Nelson v. County of Allegheny*, 860 F. Supp. 1080, 1082 (W.D. Pa. 1994). Allowing Boley to effect service some 3-1/2 years after the date of the accident *would certainly undermine these goals*.

(Emphasis provided).

In the District Court, Kaymark presented no evidence or argument that actual prejudice was suffered by Kaymark from Boley's failing to timely complete the service of process procedures required by law. Kaymark's counsel entered a general Appearance on December 6, 1995 and prior to service of process being completed. It can be easily inferred from the record that Kaymark, having already received the actual Complaint by certified mail and other related documents, provided them to his liability insurance carrier. The liability insurance carrier, in turn, requested their counsel to enter a general Appearance on Kaymark's behalf.

There is no evidence that Kaymark and/or his counsel have lost any evidence or any advantage from Boley's failure to strictly comply with F.R.C.P. 4(m), as amended, and timely complete the service of process between July 3, 1995 and December 6, 1995, and/or the date when a general Appearance was entered by counsel for Kaymark. Clearly, Kaymark suffered no prejudice between December 6, 1995 and March 4, 1996, when Boley filed his Motion to extend the time to complete service. Counsel's general Appearance on the record during the period from December 6, 1995 through March 4, 1996 gave Kaymark all the protection Kaymark needed. Kaymark had all the rights he needed to defend this claim on its merits if, during that time period, service of process had been completed.

The major premise of Petitioner's argument in Sections II (A) and (F) of Petitioner's Brief is that the Court below's decision impairs a statute of limitations defense which Kaymark has to Boley's claim. Kaymark, for reasons more fully explained in this Brief, does not have a valid statute of limitations defense to Boley's claim. Kaymark has incorrectly linked the completion of formal service of process as being necessary to timely toll the running of the statute of limitations.[10] Pennsylvania and other

10. This issue is controlled by Pennsylvania law. *See Patterson v.* (Cont'd)

jurisdictions do not require the completion of formal service of process to toll the running of the statute of limitations.

The District Court's holding that the policy behind the Pennsylvania statute of limitations would be violated if Boley's Motion to extend the time to complete service was granted was contrary to the Pennsylvania and/or controlling law. That law provides that the statute of limitation provisions are satisfied with the timely filing of the action in the District Court. It is not dependent upon formal completion of service of process, providing that the defendant is given adequate notice of the filing of the action.[11]

Boley timely filed this action in accordance with the controlling Pennsylvania statute of limitations for personal injury actions, 42 Pa. C.S.A. 5524(2). Boley gave Kaymark multiple actual written notices, including providing Kaymark, on one or more occasions, copies of the complaint initiating the action against Kaymark. Those mailings started on July 5, 1993.

(Cont'd)
American Bosch Corp., 914 F.3d 384, 387 (3rd Cir. 1990) (the state law of the forum state in an adversity action is the controlling law for statute of limitations purposes).

11. The Pennsylvania law is set forth in *Patterson v. American Bosch Corp.*, 914 F.2d 384, 391-92 (3rd Cir. 1990) (timely filed Writ of Summons and good faith attempt to serve the Summons is sufficient to toll the statute of limitations); *Leidich v. Franklin*, 394 Pa. 302, 575 A.2d 914, 918-19 (1990) (good faith defective service of an action timely filed is sufficient to toll the running of the statute of limitations for personal injury actions in Pennsylvania); *Fulco v. Shaffer*, __ Pa. Super. __, 686 A.2d 1330, 1334 (1996) ("statute of limitations has been tolled" if action was timely filed and the defendant was given actual notice by 'defective' process"); and *Young v. PennDot*, __ Pa. Cmwlth. __, 690 A.2d 1300 (1997) (statute of limitations for personal injury actions in Pennsylvania is tolled if the action was timely filed and if good faith, though defective, service by mail was attempted).

Even though Kaymark would not voluntarily sign the "waiver", which was provided him in February and March, 1994, and even though formal service of process was not completed by having personal service made upon Kaymark, the District Court erroneously concluded that the policy supporting Pennsylvania's two year statute of limitations would be violated by granting Boley's request for extension of time to accomplish formal service of process upon Kaymark.

Once Kaymark's statute of limitations argument is disposed of in accordance with the controlling law, the court below had no evidence before it that Kaymark would suffer any prejudice if Boley's F.R.C.P. 4(m) Motion to extend the time for completion of service of process was granted by the District Court. On the other hand, the denial of Boley's Motion would effectively barr any further action by Boley and cause Boley significant prejudice. The filing of any subsequent action by Boley, if this action was dismissed, would be barred by the controlling statute of limitations.[12]

Kaymark had timely actual notice of the action and counsel had entered their general Appearance before service of process was completed. There was no evidence before the District Court that Kaymark would suffer any actual prejudice if Boley's Motion to extend the time to complete service of process was granted. The court below acted in accordance with the controlling law in remanding the matter to the District Court so

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12. The possibility that a subsequently filed action by Boley against Kaymark would be dismissed for statute of limitations reasons is a substantial reason why the court below acted correctly in reversing and remanding this matter to the District Court. *See Panaras v. Liquid Carbonic Industries Corp.*, 94 F.3d 338, 341 (7th Cir. 1996) ("... the fact that the suit cannot be resolved on its merits is a fact that must be given close attention" when a District Court has granted an F.R.C.P. 4 dismissal based on non-compliance with an F.R.C.P. 4 violation.

further consideration could be given by the District Court as to whether the District Court should or should not grant Boley's Motion to extend the time for completion of service of process.

This holding and action by the court below is consistent with the holding of other courts to the effect that delay in completion of the service of process not causing actual prejudice to a party, similarly situated as Kaymark, should not result in a dismissal which may preclude a resolution of the underlying claim on its merits. *See Del Raine*, *supra* ("the lack of prejudice to the defendant is a relevant factor in determining whether a case should be dismissed for failing to timely serve defendants . . ."); *Henderson*, *supra*, 116 S. Ct. at 1642 (the United States never claimed it lacked "notice" of the complaint, nor did the United States assert "any prejudice" from the "delayed service of summons and complaint").

The court below was correct in finding that the District Court based its denial of Boley's Motion to extend the time for service on an erroneous interpretation of the law. Considering there was no other reason given for the dismissal, it was also correct for the court below to remand this matter to the District Court so a record could be established to support whatever conclusion the District Court ultimately reaches on Boley's Motion.

III.

WHEN REVIEWING A DISCRETIONARY DECISION BY A DISTRICT COURT AND CONCLUDING THAT THE DISTRICT COURT BASED ITS DISCRETIONARY DECISION ON AN ERROR OF LAW AND WHEN THE DISTRICT COURT DID NOT MAKE ANY OTHER FINDING TO SUPPORT ITS DECISION, WHETHER THE COURT BELOW COMMITTED ERROR IN REMANDING THE MATTER BACK TO THE DISTRICT COURT TO MAKE FURTHER FINDINGS.

In Sections II(B), (C), (D) and (E) of Kaymark's Petition for Certiorari, claim is made that the court below committed error in failing to find sufficient reasons to support the granting of Boley's F.R.C.P. 4(m) Motion; in failing to find that Boley failed to meet his burden of proof to support such a Motion; failing to apply the appropriate abuse of discretion standard of review; and in failing to apply a sufficiently deferential standard of review of the District Court's Opinion.

The District Court, when denying Boley's F.R.C.P. 4(m) Motion, concluded that Kaymark would suffer "severe prejudice" if Boley's Motion was granted. The prejudice would, allegedly, result to Kaymark from a service of process beyond a time permitted by the controlling statute of limitations. This holding was the sole reason stated by the District Court when denying Boley's F.R.C.P. 4(m) Motion. For reasons previously explained, that conclusion was an error of law by the District Court.

The District Court making a discretionary decision based on an error of law commits an abuse of discretion. If the court below determines that the District Court's discretionary decision is based on an error of law, it should reverse and remand. *Icicle*

Seafood, Inc. v. Worthington, 475 U.S. 709, 714 (1986) ("if it believed that the . . . proper rule of law was misapplied to . . . findings, it could reverse the District Court's judgment"); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) ("The Court of Appeals, therefore, was quite right in saying that if a District Court's findings rest on an erroneous view of law, they may be set aside on that basis"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A District Court would necessarily abuse its discretion if it based its rulings on an erroneous view of the law . . .").

Boley, in his February 28, 1995 Rule 4(m) Motion in the District Court, provided, contrary to Kaymark's assertion on pages 10 and 11 of its Petition for Certiorari, reasons why the District Court should grant his Motion. They include: (1) that Boley, as of February 28, 1996, had mailed to Kaymark all of the documents required by F.R.C.P. 4(d)(2); and (2) that no harm had been suffered by Kaymark by this delay in completing service.[13]

Boley made an offer of sufficient reasons to justify the court below, after first finding that the District Court's holding was based on an error of law, to remand the matter back to the District Court. There is no compelling need for this Court now to review the court below's holding. There will be a more complete record developed by the District Court after remand. Depending upon the ruling by the District Court, a premature review of the court below's Opinion may well be unnecessary.

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13. Boley, on February 28, 1996 and again on March 21, 1996, forwarded Kaymark potentially all the documents Boley was required to provide Kaymark, per Rule 4(m). If Kaymark had returned the Waiver in response to either request (February 28 or March 21, 1996), that would have made Kaymark's pending Motion to Dismiss moot. Formal service of process would have been completed prior to the District Court rendering its Opinion.

Kaymark claims that the court below "created the very law that the District Court violated" (Pet. at 12). That "none of the objections suggested or implied by the Court of Appeals Opinion, concern error of law" (Pet. at 12).

The court below found that the District Court "relied on its finding of prejudice to Kaymark . . . Kaymark would lose the benefit of the statute of limitations" (Pet. at A5). In the context of this specific case, Kaymark "was sent a copy of the complaint only two days after it was filed . . ." (Pet. at A7). According to the court below, considering the F.R.C.P. 4(m) Adv. Comm. Notes 1993 (Pet. at A5), this was not a "relevant" factor "bearing" on the District Court's "decision" (Pet. at A8).

If the court below did not use the magic words "error of law", it certainly implied that the District Court abused its discretion because it committed an error of law. Considering: (1) Kaymark had timely actual notice of the action of Boley because it received a copy of a Complaint within a couple days of the date when the Complaint was timely filed; and (2) satisfaction of the tolling of the statute of limitations under the controlling law was not dependent upon formal completion of service of process, the court below correctly concluded that the District Court erroneously found that Kaymark would suffer prejudice if Boley's Motion was granted.

Kaymark also claims that the court below did not afford a sufficiently "deferential standard of review" to the District Court's holding to deny Boley's Rule 4(m) Motion. For this proposition, Kaymark relies on *Cooter & Gell, supra*; *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980); and *Koon v. United States*, __ U.S. __, 135 L. Ed. 2d 392 (1996). Contrary to Kaymark's assertion, the District Court's denial of Boley's F.R.C.P. 4(m) Motion was not as a consequence of any fact intensive finding. Rather, it was based upon an interpretation of law.

There were few facts developed in the court below. There was no hearing. There was no deposition testimony available to the District Court regarding the circumstances explaining why formal service of process had not been completed within F.R.C.P. 4(m). Likewise, there was no relevant correspondence between the parties or their representatives available to the District Court explaining the cause of the delay.

In the holdings relied upon by Kaymark, *i.e.*, *Cooter & Gell*, *supra*; *Curtiss-Wright Corp.*, *supra*; and *Koon v. United States*, *supra*, there were substantial and extensive factual findings by the District Court. If those types of factual findings were available here, then there would have been a record for the court below to afford the District Court the appropriate deferential standard of review.

The court below found that the District Court committed an error of law in concluding that Kaymark would suffer prejudice if Boley's F.R.C.P. 4(m) Motion was granted. The District Court did not provide in its Opinion any other reason for denying Boley's F.R.C.P. 4(m) Motion, other than a ruling that was based on an error of controlling law. Under these circumstances, the court below was acting well within the controlling law, *Icicle Seafoods*, *supra*; *Pullman-Standard*, *supra*; and *Cooter & Gell*, *supra*, in reversing and remanding the matter to the court below for "proceedings consistent" with its Opinion.[14]

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14. Considering the District Court based its decision on an error of law and gave no other supporting reasons for its denial of Boley's Rule 4(m) Motion, the Court of Appeals was then left with a holding by the District Court which was not supported by any relevant factors bearing on the exercise of its discretion. Under these circumstances, the appropriate remedy is to remand the matter to the District Court so the District Court can conduct a hearing, if necessary, and provide a further explanation for its ruling. *See United States v. Monaco*, 23 F.3d 793, 799, 803 (3rd Cir. 1994) ("... When a Circuit Court does not know how a District Court would exercise the discretion available to it under the

(Cont'd)

IV.

WHETHER THE COURT BELOW, CONSIDERING THAT WHATEVER STATUTE OF LIMITATIONS DEFENSE KAYMARK MAY HAVE TO THE CLAIM OF BOLEY HAS NOT BEEN IMPAIRED AND MAY BE RAISED AS A DEFENSE TO BOLEY'S CLAIM PER RULE 8(c) OF F.R.C.P., VIOLATED THE RULES ENABLING ACT, 28 U.S.C. § 2072, BY HOLDING THAT KAYMARK WOULD SUFFER "NO PREJUDICE" IF BOLEY'S F.R.C.P. RULE 4(m) MOTION WAS GRANTED.

Kaymark claims that the court below violated the Rules Enabling Act, 28 U.S.C. § 2072, in that it allows a circuit court to "empower" a District Court to deprive a party of a substantive defense through the exercise of discretion. Kaymark claims that the court below, by its ruling, impaired a substantive right of Kaymark and, therefore, violated the Rules Enabling Act, 28 U.S.C. § 2072. Kaymark suggests that the holding by the court below impairs Kaymark's statute of limitations defense which Kaymark may have to Boley's claim.[15]

(Cont'd)

law, the appropriate remedy is to remand the matter to the District Court"). *See also Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 154 (3rd Cir. 1986) (not being aware of the basis for the ruling or the exercise of discretion by the District Court prevents performance of appellate review and, therefore, requires remand).

15. Kaymark claims (16) the following:

> . . . Rule 4(m) interpreted presently by the Third Circuit abridges a substantive right of a defendant *because it empowers a District Court to strip him of the protection of the statute of limitations at the District Court's discretion.*

(emphasis supplied)

The claim that Kaymark's statute of limitations defense has been impaired is incorrect. Kaymark's statute of limitations has not yet been placed at issue or adjudicated. Kaymark is free to raise the statute of limitations defense when and if it files its Answer and pleads whatever affirmative defenses it may have to Boley's claim.

F.R.C.P. 8(c) specifically provides that a statute of limitations defense is an affirmative defense and one to be raised in an answer.[16] *See Senter v. General Motors Corp.*, 532 F.2d 511, 530 (6th Cir. 1976). Generally, whether a defense is an affirmative defense is governed by the law of the forum state when federal jurisdiction is based on diversity of citizenship. *Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91 (4th Cir. 1976).

Pennsylvania is the forum state for this action. Pennsylvania considers the statute of limitations defense as an affirmative defense. *Kozak v. City of Philadelphia*, 313 Pa. Super. 89, 459 A.2d 424 (1983); *Weber v. Wyoming Valley West School District*, __ Pa. Cmwlth. __, 668 A.2d 1218, 1221 (1995) ("the statute of limitations is an affirmative defense . . ."). Irrespective of whether Rule 8(c) controls or whether that issue is controlled by Pennsylvania law, it is clear that it is an affirmative defense to be raised in an Answer and Kaymark's Rule 12(b) Motion did not place this defense at issue in the District Court or the court below.

The holding by the court below that Kaymark would not

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16. F.R.C.P. 8(c) provides, in part:

> (c) Affirmative Defenses. In pleading to a . . . pleading, a party shall set forth affirma-tively . . . statute of limitations . . . and any other matter constituting an avoidance of an affirmative defense.

suffer "prejudice" if Boley's Rule 4(m) Motion was granted does not impact or impair whatever statute of limitations defense Kaymark may have to Boley's claim. The court below never held that Kaymark did not have a valid statute of limitations defense.

Kaymark has not yet filed an Answer. Rather, Kaymark chose to file a Rule 12(b) dismissal Motion. This did not place the statute of limitations defense at issue. Kaymark's right and ability to raise a statute of limitations defense in an Answer has not been impaired by the ruling of the court below and, therefore, there has been no violation of the Rules Enabling Act, 28 U.S.C. § 2072 by the court below.

CONCLUSION

For all the reasons noted above, Respondent, Wayne E. Boley, respectfully requests this Honorable Court to deny Kaymark's Petition for Writ of Certiorari.

Respectfully submitted,

ANDREW J. CONNER
Counsel of Record
CONNER & RILEY
Attorneys for Respondent
17 West Tenth Street
Erie, Pennsylvania 16501
(814) 453-3343